No. 206.

Brief of Colbert for D. C.

BRIEF OF DEFENDANT.

Filed Apr. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

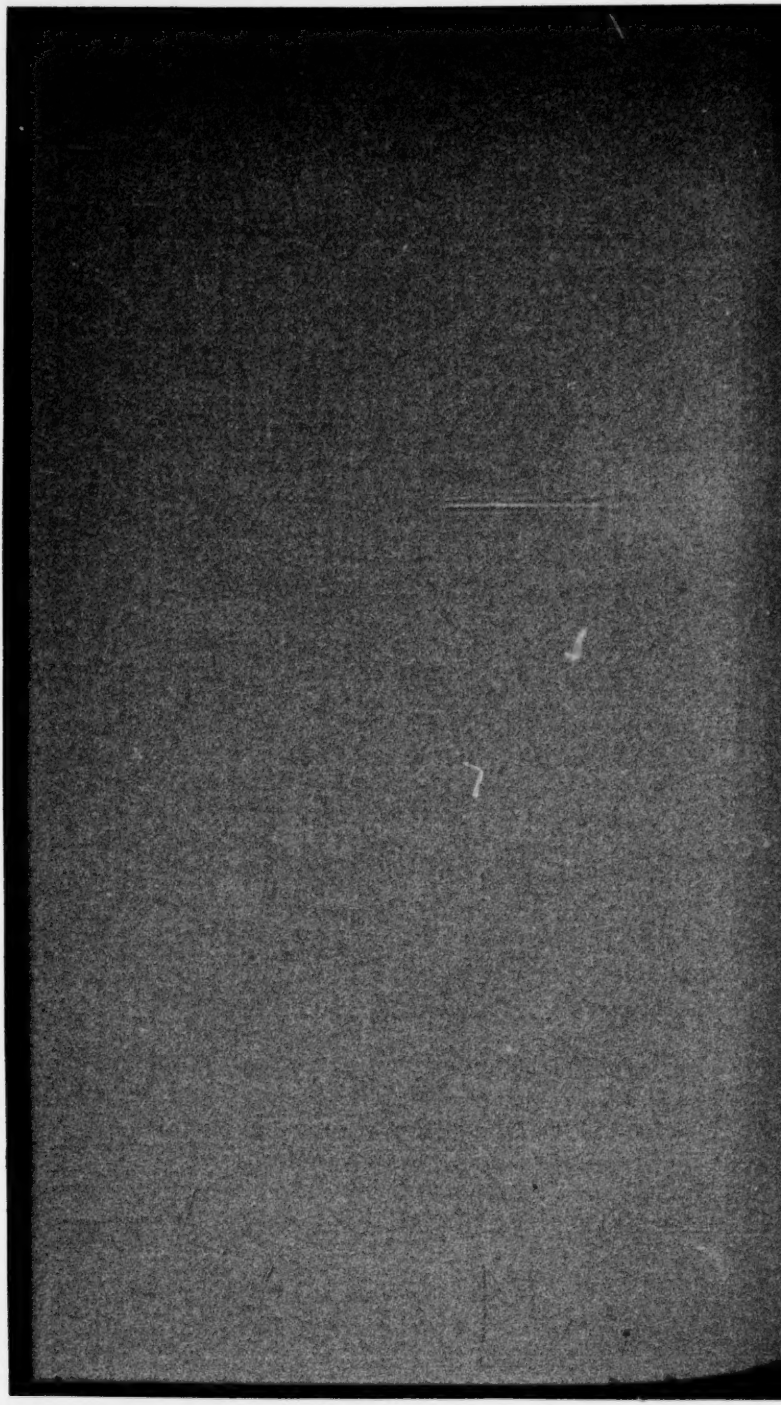
No. 206.

FRANCES REBECCA HAMILTON,
Plaintiff in Error,
vs.
GRACE ABBIE B. RATHBONE.

In Error to the Court of Appeals of the District of Columbia.

FILED JULY 27, 1896.

(16,345.)



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BRIEF OF DEFENDANT IN ERROR.

Statement of Case.

As argument for the defendant in error, we beg leave to refer the court to the very full and clear statements of the case shown in the appended opinions of Chief-Justice Alvey on the first appeal and of Mr. Justice McComas on the trial in the Special Term at the jury trial, appearing at pages 1*a* and 11*a* respectively of this brief. We will also state the natural order of the defendants proof at the jury trial, as shown in the record in a somewhat disconnected order.

1. The declaration filed June 13th, 1891. (Rec. p. 1.)

2. "The plaintiff offered in evidence a patent from the State of Maryland, conveying the ground in dispute to Anthony Holmead, and proved by record evidence, the regular descent of the title from Anthony Holmead to Ada Quintar, formerly Ada Holmead, the grantor of Abram Elkin," the father of Deft. in error. (Rec. p. 25.)

3. Ada Quintar *et vir* to Abram Elkin, on July 31st, 1867. (Rec. p. 17.)

4. Abram Elkin *et ux* to Fred. G. Calvert, on April 29th, 1872. (Rec. p. 13.)

5. Fred. G. Calvert *et ux* to Lucy V. Elkin, (mother of defendant) on April 29th, 1872. (Rec., p. 12.)

6. Marriage of defendant's parents, on April 15th, 1863. (Rec., p. 16.)

7. Death of Lucy V. Elkin, defendant's mother, on May 3d, 1876; leaving husband and 4 children. (Rec., p. 15.)

8. Death of one child at the age of 9 or 10 years, on February 2d, 1885. (Rec., p. 15.)

9. Grace A. B. Rathbone's birth, March 11th, 1864. (Rec., p. 15.)

10. Disappearance and continued absence of defendant's father, Abram Elkin, for 15 years before suit brought. (Rec., pp. 15, 16, 19, 20, 23, 23.)

11. Possession and adverse claim of plaintiff in error, defendant below. (Rec., pp. 7, 8, 16, 24, 25.)

12. Defendant also put in certain Orphans Court Records of certain proceedings, and the record of the deed from Fred. G. Calvert, Exr., to plaintiff in error, all limited to and for the sole purpose of showing that both parties *claimed* title to the land in dispute through the same common source, to wit: Lucy V. Elkin: Finally, fearing the record of proceedings in the Orphan's Court might not be legal evidence in the case for any purpose, title was proved from the State, etc., as above stated.

II.

As to the Proof of Death.

In this case the proof shows that Elkin, a month or two after his wife's death, to wit, in 1876, disappeared from his home in this city and from that date down to the time of the last trial in 1895 no member of his family and no other person has ever seen or heard from him. Elkin had no brother and no sister. It does appear however that he had a father living in Philadelphia and a mother who was estranged from her husband and not living with him. He had no other relatives on earth except his children, one of whom was a cripple.

Upon the question of Elkin's disappearance the following witnesses testify:

1. Grace A. B. Rathbone, the plaintiff, who says that she saw and talked to her father for the last time in 1876, and that thereafter she never heard from him: that she has inquired to ascertain his whereabouts and wrote to his father, who replied that he knew nothing of him: that her lawyers had hunted for him without avail. (Rec. p. 15).

Kate Ellis, who was raised with Mrs. Elkin in Charles Calvert's family; that she saw Elkin at his wife's funeral and saw him again, June 17, 1876; that he frequently visited her house; that after June 17, 1876, she never saw nor heard from him; that she inquired as to his whereabouts, but no member of his family ever heard from him; that she wrote to his father, who referred her to the Calverts, stating that Abram Elkin had not been in Philadelphia for thirty years and that he wasn't worth looking after. (Rec. p 16.)

Mrs. Hamilton testifies that since 1879 she never saw

Elkin and that he never asserted any claim of title to the property. (Rec. p. 16.)

FRED G. CALVERT testifies that Elkin stated he wanted to get out of town; that shortly after Mrs. Elkin's death Elkin left a note with Calvert stating, "Good-by, Fred I am going to leave town and not come back"; Calvert never saw him again, although he tried to find him; that he wrote to Elkin, Sr., without avail; that he wrote to the postmaster at Chicago without success. (Rec. pp. 19, 20.)

MARY J. LOWERY testified that after Mrs. Elkin's death, Elkin came to the Calvert house and wanted to stop there, but he was informed he would have to go elsewhere; Elkin's children were then living with the Calvert's; he stated that he was going to leave the city, he did not say where he was going, and Mrs. Lowery never saw him again; she also wrote to Philadelphia to Elkin, Sr., but the latter replied that he had heard that Elkin had married and gone to England. (Rec. pp. 22, 23.)

WILLIAM HOLMEAD testified that in 1876 Elkin stated that he was going to leave his children with the Calverts and was going to leave the city. (Rec. p. 23.)

In addition to this proof it appears that inquiry was made of Solomon Elkin, the father, for the purpose of ascertaining the son's whereabouts, and the father knew nothing of him, except that many years ago he heard that he had married again and left this country. (Rec., pp. 16, 22, 23.)

So that we have the testimony of six people, Elkin's children, his friend, connections and acquaintances, all testifying that he disappeared in 1876 and for nearly *twenty* years has never been seen or heard from by anybody; that his place of residence was in the District of

Columbia; that he left his home; that he never, so far as any one knows or testifies, acquired any new residence, but that he simply left the City of Washington, nearly twenty years ago, and that is all anybody knows of his whereabouts or his existence.

Upon this uncontradicted proof, we respectfully submit that in this case, the law says that his death is presumed, and that that presumption, in the absence of any shred of evidence to overcome it, is controlling, and that the court below was correct in so holding.

This being the established law what is the rule as to the presumption of death and what is the duty of the court in the light of the authorities just cited in acting upon that presumption when there is no proof against it?

The statute 19, Charles II., Chapter 6, section 2, which is the foundation of all the decisions of the courts as to presumptions will be found at page 450 of Abert's Compilation, and provides that if any person for whose life such estates shall be granted remains beyond the seas and absents himself in this realm for the space of seven years together and no sufficient proof be made of the life of such persons, in any action announced by the lessors or reversioners, the person shall be accounted as naturally dead, and the judge "*shall* direct the jury to give their verdict as if the person so remaining beyond the seas or otherwise absenting himself were *dead*."

And in Alexander's British Statutes, 499, it will be seen that the preamble to the statute recites "whereas divers lords of manors and others have used to grant estates by copy of court roll for one, two or more lives, according to the custom of their several manors * * * and it hath often happened that such person or persons for whose life or lives such estates have been granted have gone beyond the seas, or so absented themselves for many years, that the lessors or reversioners cannot find out

whether such person or persons be alive or dead by reason whereof lessors and reversioners have been held out of possession of their tenements for many years after all the lives upon which such estates depend are dead in regard that the lessors and reversioners when they have brought actions for the recovery of their tenements, have been put upon it, to prove the death of their tenants, when it is almost impossible for them to discover the same. For remedy of which mischief be it enacted, &c."

Indeed there seems to be no question about the rule, and that is that if a person absent himself from his residence for seven years without having been heard from by those who would naturally have heard from him he will be presumed to be dead.

Lawson on Presumptive Evidence, 200, states: the rule to be that an absentee shown not to have been heard of for seven years by persons, who if, he had been alive would naturally have heard of him is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term and the author cites numerous cases to support the text.

The Supreme Court of the United States lays down the same rule.

Davi *vs.* Briggs, 97 U. S., 628.

And indeed this is the rule laid down by all the courts and text writers.

Taylor on Evidence, Sec. 157.
Stephen on Evidence, ch. 14, art. 99.
1 Greenleaf on Evidence, Sec. 41.
See also Baden *vs.* McKinney, 18 D. C., 268.
1 Am. and Eng. Enc. of Law, 39 and cases there referred to.

Applying these principles to the facts contained in this record, it will be seen that Elkin, who had his domicile

and residence in the District of Columbia, left here in 1876, and has never since been heard from by anybody, except that two or three years later his father *heard* that he had gone to England and Calvert heard he was in Chicago, but upon inquiry, there it was found that this information was incorrect. Certainly since 1880 no one who testified at the trial or who was applied to for information by any of the witnesses ever saw or heard from Elkin, so that during the ten or eleven years next before the beginning of this action there is absolutely no evidence explaining his continued absence. Thus we bring this case beyond any shadow of doubt within the first branch of the rule.

Nowhere does it appear that Elkin ever acquired a new residence elsewhere, or had any intention of locating elsewhere when he left this city. Now, then, who are the persons who would naturally have heard from him. Calvert had in his possession nearly $1,000, to which Elkin was entitled and certainly it is natural to suppose that Elkin would if living communicate with the man who was the custodian of his money. But Calvert never heard from him, although he is diligent in trying to ascertain his whereabouts.

Elkin's father knows nothing of him and hears nothing from him. His own children, one of them, a helpless cripple never hear from him, although they and their lawyers have tried to find him. His friends and acquaintances and associates inquire for him and yet no one can ascertain whether he be living or dead.

Within the rule laid down by all the decisions is there *a presumption* that he is dead? We submit that the proposition is to plain for discussion and the presumption of death, after seven years' absence, is strengthened by the fact that instead of being absent for seven years he has been absent for twenty years.

This being the presumption what is its effect? It may be true that the presumption is only *prima facie*, but the presumption must prevail in the absence of any evidence to the contrary.

"The law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode *the law* defines the nature and amount of the evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party, and if no opposing evidence is offered the jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside as against the evidence."

1 Greenleaf on Evidence, see 33.

In U. S. *vs.* Wiggins, 14 Peters, 347, the court says: "What is *prima facie* evidence of a fact? It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."

We confidently submit that upon this point of the case there was no error in the ruling of the trial justice.

III.

Tenancy of Elkin Destroyed.

We further urge and submit that under the undisputed evidence in this case the defendant in error need not rely alone on the death of her father to show her right of entry. It is established by the evidence of the other side that he did vacate the property, and that he publicly announced that he was going to leave the city and not return. He made no provision for the payment of the taxes, nor for the care or control of the property; he utterly abandoned and deserted it for more than fifteen years before suit brought. He was not compelled to

occupy as tenant by the curtsy; it was optional with him to surrender his right, and he both verbally and in writing declared that he was going to leave finally, and did leave; that ended his tenancy.

Moore *v.* Allen, 3d Conn., 483.
McKenney *v.* Reeder, 7th Watts, 123.

Again: By the evidence of the other side, it also appears that the father intended and expected the property to be sold, but took no steps, made no effort, used no means to prevent it; on the contrary, he in effect encouraged it, assumed that it would be done, treated with the assumed executor for prepayment of part of the purchase money, and actually received "something over $200" (Rec. p. 19); and on deserting the house left a note in his own handwriting saying: "Good-bye Fred, I am going to leave and *not come back.*" Thus inviting, aiding and abetting the sale, and affording the purchaser full and free opportunity to gain possession under a colorable title, and set up an adverse claim of title in fee against all the world, which was afterwards done by Mrs. Hamilton, and her adverse possession has been maturing for over eighteen years.

Now, we confidently submit that it was the legal duty of this tenant by the courtesy to *prevent* the very thing he thus helped to bring about; and that, in legal effect, her adverse claim of title is his adverse claim of title, by which he repudiates and destroys his tenancy, which gives the heir a clear right to maintain ejectment.

4th Kent., Com. 34 and 77.
Walden *v.* Bodley, 14th Pet., 156.
Zeller *v.* Eckhardt, 4th How., 289.
White *v.* Wagner, 4th H. & J., 373.
McKenney *v.* Reeder, 7th Watts., 123.
Sacket *v.* Sacket, 8th Pick.

IV.

As relating to the right of entry in the defendant in error, and with some hesitation, it is also submitted that it was not absolutely incumbent on her part to prove the death of her father in order to make out a good valid *prima facia* case.

Having proved a legal title in her mother, the possession of her father and mother and the death of her mother, and her own legal heirship to a third interest, that established her own legal title in fee, which carried with it a legal right of possession. See Classon *vs.* Baldwin, 37 N. Y. State Reporter, 213; that in connection with the other admitted fact, that the plaintiff in error had been in undisputed adverse possession for more than 11 years, raising a strong presumtion that the right of possession in the life tenant had, in some way, been extinguished; put it upon her, if she would defend through an outstanding right of possession in Elkin, to prove it affirmatively, at least by proving his existence when the suit was brought.

Had an outstanding legal title in fee been set up in defence, under well known practice it would have been necessary to prove it, and that it was a subsisting title.

There may be some vice in this reasoning not now observed, and so it is submitted for what it may be worth; believing that it is founded on legal principles so plain and familiar as not to need the citation of authorities.

V.

As to Estoppel in pais.

The evidence shows that during her minority the plaintiffs was supplied with same articles of clothing by Calvert, the executor of her mother's estate, but she never received any money from him.

Calvert testified that he bought clothing for the plaintff, and gave her money to pay her board, but that he did not know whether he had any of the proceeds of the sale remaining in his possession after 1881, and that he did not know whether or not he gave her anything after 1881.

Mrs. Calvert testified that the money derived by her husband from the sale to Mrs. Hamilton was exhausted before the plaintiff became of age. Mrs. Hamilton testified that in September, 1885, after the plaintiff attained majority, she (the plaintiff) called upon her and said that she didn't see what right Calvert had to sell the property that belonged to her father or her mother.

The plaintiff herself testified that she did not remember receiving anything from Calvert after she became of age; that she first learned that Calvert had no power to sell the property in 1891 when she was first informed by her attorney; that Calvert never informed her out of what fund he was purchasing the clothing which he gave her, and that after learning her rights in her mother's property she never received anything from Calvert; that she did receive a pair of shoes from Calvert, but she does not know whether she was then of age or not; that at the first trial she testified that she was probably over 21 years of age.

In the case of Dickerson *vs.* Colgrove, 100 U. S., 579, an action of ejectment, the court says: "The estoppel here relied upon is known as an equitable estoppel, or estopel *in pais*. The law upon this subject is well settled. The vital principle is that he, who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both." And in that case the defendant was misled by the con-

duct of the plaintiff upon which reliance was had.

To the same effect in the case of Kirk *vs.* Hamilton, 102 U. S., 68.

In the case of Craig *vs.* VanBibber, 18 Am. St. Rep., 674, it is said that if the infant receive a consideration from the other contracting party "but has spent, wasted, or disposed of it during his minority, so that it no longer remains in his possession, the reason which requires him to disaffirm the contract within a reasonable time after coming of age, in order to avoid being bound does not exist."

In the present case it is not pretended that the plaintiff received anything from the defendant or that the plaintiff did or said anything upon which the defendant acted to her detriment. On the contrary the proof shows that on the only occasion upon which she ever saw the defendant, Mrs. Rathbone, repudiated Calvert's right to sell the property in dispute.

The inquiry here is—Did the plaintiff after her majority, with full knowledge of all the facts and of all her rights thereunder, knowingly elect to take the proceeds of the sale instead of the land itself and thereby estop herself from maintaining this suit?

Upon this inquiry the burden is upon the defendant to show that the plaintiff ratified this unlawful sale after attaining her majority by electing to take from Calvert the proceeds of the sale in his hands, and the answer to such a contention in the first place is that there is no such proof in the record.

Mr. Calvert says he does not know that he had any money left after 1881, the plaintiff having reached her majority in 1885, and Mrs. Calvert testified that the money was all exhausted before the plaintiff became of age. The plaintiff herself testified that she did not remember receiving anything whatever from Calvert after

she was of age. But she does say that at the last trial she said Calvert may have given her a pair of shoes after her majority. We would suggest in the language of the Supreme Court of the United States, even assuming that the mere gift of a pair of shoes by Calvert to his own niece, without specifying from what funds he made the purchase, or that it was not a gratuity amounted to an estoppel, *de minimis non curat lex.*

Winconsin Central R. R. *vs.* Forsythe, 159 U. S., 62.

So that we contend in the first place, there is a total failure of any proof of ratification, and in the second place, this case does not come within any of the principles of equitable estoppel.

The correct rule is laid down in Hoffman *vs.* Coal Co., 16 Md., 508, where the court says: "to render the act ratification effecutal, the principal must have been aware of every material circumstance of the transaction, and his act of ratification must have been founded on complete information, and in addition he must not only have been acquainted with the facts but appraised of the law, how those facts would be dealt with if brought before a court of equity."

And in Reynolds *vs.* Insurance Company 34, Md. 289, it is stated: "A party will not be held to have waived his rights or be estopped by his conduct or acts unless it is shown that he acted with full knowledge of all the facts affecting his rights."

And in Tucker *vs.* Moreland, 10 Peters, 76, the court says: "Admitting that acts *in pais* may amount to a confirmation of a deed, still we are of the opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed *after a full knowledge that it was voidable.*"

We further contend that this contention of an estoppel *in pais* must fail for the reasons that there is no evidence that the plaintiff in error either requested, permitted, authorized, or knew of *Calvert's* application of any part of the $1,500 purchase money to or for the benefit of the four children of Lucy V. Elkin, or that Calvert had any authority either as executor or guardian to apply the proceeds of the sale to their support, nor does the record show what part of this supposed expenditure went to the benefit of this defendant, so that these transactions between the defendant and her uncle cannot be invoked to effect the rights of the parties to this action. If the defendant had gone to the plaintiff, Mrs. Hamilton, before the $1,500 had been paid and got from *her* orders for shoes or money, knowing her rights to repudiate the sale, the case would be essentially different.

Nor does it any where appear that the defendant was misled to her injury by any act or omission of the defendant, either during her minority or her majority, for the plaintiff and her daughter both say that the improvements had to be made and were made in order to render the property habitable, and the plaintiff says she made no improvements after 1885; so that instead of being misled or lulled into security by the inquiries of the plaintiff after her majority, it would seem the defendant was put on her guard with respect to the plaintiff's claim of title.

VI.

General or Separate estate?

Did the defendant's mother, Lucy V. Elkin, hold the property in dispute as her statutory separate estate, or did she hold it as her general property, subject to all her common law disabilities as a married woman?

The original Act of the 10th of April, 1869, is in these words:

"In the District of Columbia, the rights of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts, but such married women may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried." (16 Stat., 45.)

In the revision the revisors broke this section into two sections and Sec. 727 is in these words:

"In the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband shall be as absolute as if she were unmarried, and shall not be subject to the debts of her husband or liable for his debts."

And Sec. 728 in these words:

"Any married woman may convey, devise, or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

In the case of Sykes *vs.* Chadwick, 18th Wal., 141, Mr. Justice Bradley in the opinion said that:

"By the Act of 1869, the plaintiff as a married woman acquired the capacity at law to receive property to her separate use and subject to her separate and exclusive

control, as if she were unmarried, provided it does not come to her by gift or conveyance from her husband, *by which is undoubtedly meant, voluntary gift or conveyance.*" (the italic being ours.)

A *voluntary* conveyance is well defined to be a conveyance without *adequate* consideration, 2d Bouv., L. D., 645, and an *adequate* consideration "is a consideration of equal value of the thing obtained for it." There was some evidence tending to prove that several small sums of money coming from Solomon Elkin for the benefit of the family and some of the wife's savings were used in improving the property; but if it be conceded that all the money mentioned by all the witnesses had moved Elkin to convey the property to his wife it would not have taken the conveyance out of the class of *voluntary* conveyances. The meagerness of the price paid would have condemned it as evidence of a real sale in good faith to a *bona fide* purchaser.

And we further submit and contend that it is quite immaterial what equities existed between Elkin and his wife that *might* have been made the consideration of the conveyance, unless it is proved that they *were* the actual producing cause of the conveyance being made. Not one of the witnesses even attempts to state that such was the real moving cause or consideration.

On the contrary, Fred Calvert, her brother and engineer of the transaction, tells the whole story when he says: "People were coming to him with bills. He said he wanted to make it over to his wife so that they could not touch it, or something like that." (Rec., p. 19.)

And further on he said, "I do not remember whether I paid him anything for it or not. I suppose the five dollars passed through our hands just as a matter of form so as to make it over to his wife. I may have passed the five dollars over to Mr. Elkin and had it passed back

again to me. But I suppose that was the extent of the money that was furnished when the deeds were executed. Mr. Elkin wanted to make the property over to his wife and that was all there was of it." (Rec., p. 21.)

The history of Lucy V. Elkin's title is this: Abram Elkin was the owner of the property. He and his wife united in a deed to his wife's brother, the consideration being $5.00. By another deed, executed by the same officer, on the same day, and recorded at the same time, the title was immediately conveyed back to the wife, the consideration in this deed also being $5.00, and both deeds were delivered by the Recorder to Abran Elkin, after having been copied into the public records.

The circumstances all show beyond a reasonable doubt that this transaction is the familiar one by which men place the title to their real estate in the names of their wives for family reasons, through motives of prudence, or a desire to ensure a home for their families, and in the absence of any proof whatever to the contrary it must be held to be a voluntary conveyance. In addition to this, however, the consideration expressed in the deeds shows that the conveyance from the husband to the wife was a voluntary one, and that he received no adequate equivalent for the transfer. The consideration appearing on the face of the paper will be taken to be true until the contrary appears. There is no proof that Abram Elkin received any actual value for this conveyance, and not only is it the presumption that the conveyance was voluntary, but it is so proved. In support of the proposition that the sum named in a deed will be taken *prima facia* to be the actual sum paid in the absence of other proof, we refer to the following authorities.

3d Washburn on Real Property, (5th edition) p. 619.

Belden *vs.* Seymour, 8 Conn., 310.

Clements *vs.* Landrum, 26 Ga., 401.

At common law, husband and wife, by reason of the marital relation, were incompetent to contract with each other and a deed from one directly to the other was at law a nullity, and passed no title. Where the husband desired to vest title in the wife, a conveyance was made to a third party, who in turn conveyed back to the wife. Although in a case of this sort the title of the wife is apparently derived from the third party and not from the husband, it has been often decided that the wife's estate is not the separate property contemplated by section 727, of the Revised Statutes relating to the District of Columbia.

In the case of Kaiser *vs.* Stickney, 131 U. S. CLXXXVII, (appendix of omitted cases) it was expressly so decided. This report does not contain a statement of the facts, but in 3 McArthur, (D. C.) 118, or in Vol. 26, page 176, Lawyers' Coop. Edition of the United States Supreme Court Reports, where the same case is reported, it will be found that Henry Kaiser conveyed the property in dispute to Frederick Johnson, who immediately conveyed the same to Caroline Kaiser, the wife, in fee simple, and by reference to Liber 581, page 153, of the Land Records of the District of Columbia, it will be seen that the two deeds in that case were precisely like the two deeds in the present case, so far as this question is concerned. This conveyance to Mrs. Kaiser as the Court in General Term said was perfectly good for the purpose of vesting title in her independently of the Married Woman's Act of 1869, but in regard to her control over the estate she was not to be regarded as a *feme sole*, and as was said by Chief Justice Waite, in 131 U. S., "it is very clear that the property in question was not, under the provisions of Section 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser, but it was her general property."

In Williams *vs.* Reid, 19 D. C., 46, the Court in Gen-

eral Term, speaking through Mr. Justice Hagner, said in relation to the character of the wife's estate derived from her husband through the intervention of a third party, that "the whole property originally belonged to the husband, and was vested in her in consequence of his gift, and the formal fact that it was conveyed by them both to Thompson for the purpose of securing to her the part she now holds, does not change the principle."

This is undoubtedly the law, and if it were not so the language of the Married Woman's Act would be meaningless. That act especially exempts from its operation the title to real estate derived by conveyance from the husband, and the only way in which a married woman could derive real estate from her husband was through the intervention of a trustee and to the same effect is the recent case in the District Court of Appeals in the case of Cammack *vs.* Carpenter, 3 App. (D. C.) 219, where one George A. Lane and wife conveyed to J. J. Johnson, who immediately conveyed back to the wife. Chief Justice Alvey, in delivering the opinion of the court, says: "The deed to Mrs. Lane from Johnson was in effect and contemplation of law a conveyance of an estate from her husband, Johnson being the mere medium for the transfer of the title from the husband to the wife. The property, therefore, was not acquired in a manner nor from a source to make it her separate and absolute property within the meaning of Section 727, &c., so that we submit that the construction of this Act of Congress has become a Rule of Property in this District by an unbroken series of many judicial decisions and should be adhered to in this case.

VII.

This property being the general property of the wife and not her statutory separate estate, she could transmit the same or the heirs, but she could not dispose of it by will.

It being conceded on both sides that Mrs. Lucy V. Elkin at the time of her death had a fee simple estate in the land in question, the plaintiff made out her case by proving her heirship, and unless the defendant can vindicate her claim of ownership by establishing the validity of Mrs. Elkin's will, and the deed made thereunder by the executor, necessarily the plaintiff must recover. The controlling questions, therefore, are the validity of the will and the power of the executor thereunder. At common law a *feme convert* had not only no power to make a will of real estate, but she could not make a testament of chattels without her husband's consent.

Black. Com., Book 2, p. 498;
4 Kent, 505;
2 Dess. ch. Reps., 66.

The reason of this rule is that according to the theory of common law, a wife's identity was to a large extent merged in that of her husband. She was not *sui juris*, not a free agent. She was under the power and control of her husband, and in addition to that, her incapacity to make a will depended largely on the fact that she had nothing to dispose of. Indeed, it is well settled that except in a representative capacity, or by virtue of a power, a married woman at common law had no power to dispose of a freehold estate by will. In the Statute of 34 and 35 Henry VIII, Chap. 5, Sec. 14, referred to in 1st Jarman on wills, p. 58, it was expressly enacted that wills of married women were null and void, not because the disability was unknown to the common law, but because it was apprehended that the general terms of the prior act of 32 Henry VIII might be taken to have removed her preexisting common law disabilities. That at common law a married woman had no power to devise her real estate, see

Shep. Touch., 402.
2 Black., 497.
2 Kent Com., 170.
3 Com. Dig., 13.
Powell on Devises, 97.
Marston *vs.* Norton, 5 N. H., 205.
Osgood *vs.* Breed, 12 Mass., 525.
Gebb *vs.* Rose, 40 Md., 387.
Van Winkle *vs.* Schoonmaker, 15 N. J., Eq., 384.
Bradish *vs.* Gibbs, 3 Johns. Chan., 523.

So that at the time of the passage of the Married Woman's Act of 1869, undoubtedly the will of a married woman attempting to dispose of real estate was null and void, and if the common law in the District of Columbia has been changed at all, we must find the change within the limits of that statute.

Section 727, of the Revised Statutes relating to the District of Columbia, provides that "in the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance, from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the debts of her husband or liable for his debts."

Section 728 provides that "any married woman may convey, devise, or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

If section 728 stood alone it might be argued, that by this section a married woman was given power to dispose of all kinds of property either by will or by deed, whether the property was her general estate, or was acquired in the manner prescribed in section 727. But this is manifestly not the meaning of the law. If it were,

section 727 might as well be stricken from the statute books. The property referred to in section 728, is the *same* property as that mentioned in section 727, and this is perfectly apparent from a reading of the original act in Vol. 16, p. 45, of the Statutes at Large. The language there is as follows:

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts, but such married women may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as she were unmarried."

It is only therefore as to her separate estate, acquired in the manner pointed out by this statute, that is *in some other way than by gift or conveyance from her husband*, that a married woman can make a valid will of real estate. With respect to her general property, as is her property in the present case, she holds it subject to her common law disabilities.

In the case of Cammack *vs.* Carpenter, above cited, it was held that a deed made by a married woman, but not made in the manner pointed out by Section 450 and 451 of the Revised Statutes of the United States relating to the District of Columbia, was void and of no effect. At common law she had no power to make such deed, and she had not brought herself within the requirements of the statute changing the common law rule. Here, it must be conceded that at common law Mrs. Elkin had no power to dispose of her real estate by will, and the Married Woman's Act of 1869, does not change the rule ex-

cept as to her statutory separate estate. This, we respectfully submit, independently of other considerations is conclusive of the present case.

VIII.

There was no competent evidence offered at the trial to prove the validity of the will of Lucy V. Elkin, and the title claimed by the appellant thereunder.

At the trial the plaintiff as part of her case in chief, and for the purpose solely of proving that she and the defendant claimed title from the same common source, offered in evidence "the record of the paper purporting to be the last will and testament of Lucy V. Elkin," and the deed thereunder from Calvert, the executor named in said paper to Mrs. Hamilton the plaintiff in error here. The plaintiff, however, not deeming it safe to rely upon this evidence of claim of title from the same common source, and upon objection being made to the introduction of the record of the proceedings of the Orphans' Court, (although that objection does not appear in the present record) abandoned the Orphan's Court Record as proof of her title, and afterwards by leave of the court first had and obtained (Rec., p. 25) traced her title regularly from the State of Maryland. But if the record of the probate of Mr. Elkin's will be considered in the record at all, it was offered for the sole purpose of showing a *claim* of title on the part of the defendant. The plaintiff did not attempt to prove the execution of the will and did not offer it in evidence for any other purpose whatever, and the defendant (plaintiff in error here) did not produce the original will and did not offer it in evidence at all. Consequently the offer of the plaintiff of the record of the Orphans' Court did not constitute proof of the due execution of the will as a valid

instrument to pass the title to real estate, and conceding as we must, that the plaintiff had made out a *prima facie* case by tracing her title from the State of Maryland the defendant's case wholly fails. There was no sufficient proof on the part of the defendant of the paper purporting to be Mrs. Elkin's will. It was not shown to have been executed in the form required by law. It did not appear that Mrs. Elkin ever signed it at all, and the probate of this paper in the Orphans' Court of the District of Columbia is not sufficient evidence of the validity of the paper as a will of real estate.

Robertson *vs.* Pickrell, 109 U. S., 608, 610.
Darby *vs.* Mayer, 10 Wheaton, 465, 471, 472.
Smith *vs.* Steel, 1 Har. & McH., 416.
Michael *vs.* Baker, 12 Md., 158.
Buchanan *vs.* Turner, 26 Md. 1.

In the case of Robertson *vs.* Pickrell *supra*, 486, this court speaking through Mr. Justice Field says: "By the law of Maryland which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common law rule prevails on that subject. The Orphans' Court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will, only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof of the subscribing witnesses, or if they be not living by proof of their handwriting" and that doctrine was affirmed in the case of Campbell *vs.* Porter, 162 U. S., 478. So that it is respectfully submitted, even if this court should not agree with the Court of Appeals of the District of Columbia as to the nature of

the estate held by Mrs. Elkin, or her power to make a valid devise of it, the court is not judicially advised by the record before it, that she ever attempted to devise the property involved in this litigation, and that the judgment below should not be disturbed on either of the grounds referred to.

IX.

After most of the foregoing pages were in print, a copy of the brief filed in this court has been handed us, and as some of the grounds urged for reversal were not insisted upon in the court below, and for that reason have not heretofore been considered. It is insisted by the plaintiff in error, that the language of the deed to Mrs. Elkin was sufficient to create in her an equitable separate estate which she had power to dispose of by will. It is undoubtedly true that in equity a married woman independently of the provisions of the Married Womans Acts, might dispose of real or personal property which was limited to her sole and separate use, but to create this right in the wife the limitation to her separate use in order to oust the marital rights of the husband must be clearly established by the terms of the instrument creating the estate. As was said by Chief-Justice Alvey in 4 Appeals, D. C., 488, "If the gift or conveyance be designed to be for the wife's separate and exclusive use that intention will be fully acted upon and carried into effect. But the question is whether the instrument of conveyance shows plainly that to have been the intention of the parties to it, for as was said by Judge Storey 'the purpose must clearly appear beyond any reasonable doubt, otherwise the husband will retain his ordinary legal and marital rights in the property' indeed in all cases the words must manifest an unequivocal intent to exclude the power and marital rights of the husband.

The rule is thus stated in Pomeroy's Equity Jurisprudence, Vol. III, page 22, section 1102: "No particular form of words is necessary in order to vest property in a married woman for her separate use, and thus to create a separate estate. * * * The intention, however, must be clear and unequivocal not merely to confer the use upon the wife for her benefit, *but also to exclude the husband.* The doctrine was very concisely and accurately stated by Vice-Chancellor Molins in a recent case: 'There must be in a will or in any other instrument an intention shown *that the wife shall take and that the husband shall not.*'"

In the notes to section 1102 of Pomeroy above referred to, most of the cases English and American are cited, and from an examination of these cases, it will appear that a mere limitation to the sole use and benefit of the wife will not be sufficient to create in her an equitable separate estate.

In Lippincott *vs.* Mitchell, 94 U. S., 767, this court, speaking through Mr. Justice Swayne says: "No particular words or phrases are necessary to create an equitable, separate estate. The court will examine the whole instrument and look rather to the intent manifested than to the language employed. The creative intent must clearly appear. Doubts are resolved in favor of the husband's marital rights. * * * If it were intended by this deed to give the wife a separate estate it is remarkable that in the mass of redundant verbiage employed no words clearly apt for that purpose are to be found. It is remarkable that if such an intent existed the phrases "for her separate use" or "for her exclusive use," or "free from the control of her present or any future husband" or some equivalent for one of them were not inserted. The only part of the deed which gives a shadow of support to the proposition of the appellants is

the language of the *habendum*. The same language is to be found in many precedents in books of forms where certainly there was no purpose to create a separate estate." In that case the language of the *habendum* was "unto the said Nannie C. Mitchell, her heirs, and assigns, to the sole and proper use, benefit, and behoof of the said Nannie C. Mitchell, her heirs, and assigns forever," and the court held such language insufficient to create an equitable separate estate in the wife. In the present case, the only words that could be construed into creating an equitable separate estate in the wife are also found in the *habendum* (Record, p. 12) and the words are almost identical with those referred to in 94 U. S., the language being, "To have and to hold the said piece or parcel of land and premises with the appurtenances unto the said party of the second part, her heirs, and assigns to and for her and their sole use, benefit and behoof forever." These identical words are to be found in ninety-nine out of every hundred deeds in fee simple of record among the Land Records of the District of Columbia, whether the grantee be a married woman or not. They are inserted in all the forms in common use for the purpose of bringing the conveyance within the operation of the statute of uses and it was never before contended that they were operative in the case of married women to create in them an equitable separate estate to the exclusion of the ordinary marital rights of the husband. It seems to be conceeded in the brief filed on behalf of the plaintiff in error, that the decision in the case of Lippincott *vs.* Mitchell would be controlling were it not for the circumstance that in the present case the conveyance was from the husband himself to the wife, and for that reason a different rule of construction should prevail, the argument being that in such a case all the presumptions should be resolved as against the husband, and

that because he made the conveyance to his wife, the husband intended to strip himself of all his marital rights with respect to his property.

With reference to the cases cited upon the brief of plaintiff in error from pages 7 to 21, it is sufficient to state that these cases arise upon the construction of wills by courts of equity, in which the grantor, in addition to the use of words apt for the creation of a separate estate in the wife, manifested a clear intention to exclude the marital rights of the husband.

In this case, however, the defendant seeks to rely upon a purely equitable title in an action of ejectment when only legal defences can be availed of, as shown in the following cases.

Johnston *vs.* Christian, 128 U. S., 374.
Bragnell *vs.* Broderick, 13 Pet., 436, 450.
Hooper *vs.* Schneider, 23 How., 235.
Langdon *vs.* Sherwood, 124 U. S., 74.

The circumstance that this is a transfer from husband to wife is against rather than in favor of the construction that the husband intended to strip himself of all future benefits from the property, since he must be held to have known that while the legal title was effectually vested in the wife, he was entitled to hold possession during life and so to escape the demands of creditors. This fact, together with the meager evidence in the record (Rec., p. 19) that Elkin made conveyance to place the property beyond the reach of his creditors all negative the idea that the husband intended to exclude himself from all further connection with a benefit to be derived from the property conveyed. There is no evidence in the record, tending to show that the husband intended to make a settlement upon the wife for her sole and exclusive benefit and there is no recital in the deed

itself tending to show that he intended to strip himself of all further or future control over or interest in the property conveyed, and in the absence of any such showing, it is submitted that the ordinary rules of construction should prevail.

X.

The assent of the husband to the execution by the wife of a will disposing of real estate, is not sufficient to give such a will validity, and there is no evidence whatever in this will that any such assent was given.

That the assent of the husband is insufficient to enable a married woman to dispose of her general property by will, we refer the court to the following cases.

Osgood *vs.* Breed, 12 Mass., 525.
Moore *vs.* Thompson, 4 Cush., 563.
Marston *vs.* Norton, 5 N. H., 205.
Wakefield *vs.* Philips, 37 N. H., 295.

But apart from this question there is absolutely no evidence in this record tending to show that prior to the death of his wife, Elkin had any knowledge whatever that she had made a will or intended to make one, and there is no evidence whatever that he acquiesced in or permitted or directed the execution of any will. Whatever knowledge Elkin may have had of the will after his wife's death or whatever acquiescence by him in its provisions *after* her death there may have existed cannot play any part in the present controvessy. This is not a suit between the plaintiff in error on the one side and Mr. Elkin or those claiming immediately under him, on the other hand upon the death of Mrs. Elkin, the rights of her children became fixed and absolute and nothing that Mr. Elkin did or omitted to do could affect the rights of his children.

With regard to the suggestion, rather than contention, that Mrs. Elkin's will was not a will of real estate but a will of personalty because by the terms of the will a conversion of the real estate into money is directed, it need only be said that no such conversion can be said to arise until after the death of the testatrix. The validity of the will in question must be determined by the capacity of the testatrix and the nature of the property derived *at the time the will* was executed.

The plaintiff in error next contends that by force of the Maryland Act of 1798, the common-law disability of a married woman to make a valid will of real estate has been removed, and that by virtue of its general provisions, a married woman is rendered just as competent to dispose of her property by will as any other person. It is contended that by force of the Act of 1798 the disability created by the English statute of 34 and 35 Henry VIII, Chap. 5, Section 14, has been removed and the provisions of that statute repealed. But it is a mistake to suppose that the disability of a married woman to make a valid devise is the creature of that statute. Her disability existed by reason of her coverture independently of the institution of the statute, and in the Statute of 34 and 35, Henry VIII, (referred to in 1st Jarman on Wills, p. 58), it was enacted that wills of married women were null and void not because the disability was unknown to the common law but because it was apprehended that the general terms of the prior Act of 32, Henry VIII, might be taken to have removed her pre-existing common law disabilities. If the English Statute of Wills was never in force in the State of Maryland as seems to be contended for in the brief filed on behalf of the plaintiff in error, then there never was any legislative or common law power to make a valid will in the State of Maryland until the year 1798. Married women were not given any power

by the express terms of this statute, to make a will, and there is no hint anywhere that it was intended to remove her pre-existing disabilities. The adjudications in the State of Maryland are all against the idea that the force and effect of the Statute of 1798 had any such sweeping effect as is contended for.

In the case of Buchanan *vs.* Turner, 26 Md., 1, decided in 1866, it was held that under the provisions of the various enabling statutes in Maryland, while the property of a married woman not limited to her sole and separate use was protected from liability for the debts of the husband, his marital rights over it remained unimpaired. Property so held by a married women, she could not dispose of by last will and testament except with the consent of her husband, and by an instrument executed and acknowledged as prescribed by the 6th section of the Act of 1842, chapter 293.

And so in the case of Bridges *vs.* McKenna, 14 Md., 258, decided in 1859, the court says that as to the general property of a married woman, not limited to her sole and separate use, the marital rights of the husband remain unimpaired.

See also Insurance Co. *vs.* Deale, 18 Md., 26.
Weems *vs.* Weems, 19 Md., 334.

Upon this branch of the case we submit that there is not the slightest foundation for the contention that there was no such thing known as a common-law disability to make a will by reason of coverture, nor for the contention that the statute of wills never was in force in the State of Maryland, and that the testamentary Act of 1798 has the sweeping force and effect as is claimed for it. The courts of Maryland have never sustained any such contention and no case is cited in support of it.

It is not contended seriously that the provisions of the Married Women's Act of 1869, as originally enacted conferred upon Mrs. Elkin any power to dispose of real estate not her separate estate under the terms of that act or that was not limited to her sole and separate use. It seems to be conceded that as to her general property that act does not remove Mrs. Elkin's common-law disabilities, but the argument is that the language of the revision does have that effect.

The language of the original Act of 1869, is as follows:

"In the District of Columbia, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband shall be as absolute as if she were a *femme sole*. * * * Such married woman may convey, devise, and bequeath *the same*, or any interest therein in the same manner and with like effect as if she were unmarried."

In the revision this act was split into several sections, section 727 defining what shall be the separate estate of the wife and section 728 providing that "any married woman may convey, devise, and bequeath *her property*, or any interest therein in the same manner and with like effect as if she were unmarried."

The question then is what is meant by the words "her property" used in the revision? Does it mean her property generally; does it mean property limited to her separate use or does it mean the property referred to in the section immediately preceding? For the purpose of construing this language, recourse should be had to the Act of Congress providing for the revision of the Statutes of the United States and the powers of the Commissioners thereunder.

By act approved June 27, 1866 (14 U. S. Statutes, p.

74) the Commissioners are directed "to *simplify, arrange, and consolidate* all the statutes of the United States, general and permanent in their nature which shall be in force at the time such Commissioners shall make the final report of their doings."

Section 2 provides that "in performing this duty the said Commissioners shall bring together all statutes and parts of statutes which similarity of subject, ought to be brought together, omitting those redundant or obsolete, *and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text.*"

From the reading of this act, it would appear that the powers of the Commissioners is limited to making such alterations as may be necessary *to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text.*

In dividing the original act into sections, consisting of independent sentences it was obviously impracticable to retain in the revision the words "the same" used in the original act; of necessity the verbiage had to be changed, and the revisors instead of using the words "the same" used the words "her property", the meaning being the property referred to in every other section of the act, and in relation to which the act was intended to operate. It is not conceivable that by the revision it was intended to enact such substantive legislation so radical in its nature and so far reaching in its effect as the construction contended for on the other side would lead to. The most that can be said is that the revision has given rise to a doubt as to the meaning of the statute, to resolve which doubt recourse might always be had to the original text.

Cambria Iron Co. *vs.* Ashborn, 118 U. S., 54.

United States *vs.* Lacher, 134 U. S., 624.

In the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, the deed was not executed until *after* the passage of the Married Womans Act of 1869, and not *before* the passage of the act as stated in the brief of plaintiff in error. In the hearing of this case before the Court of Appeals of the District of Columbia, the original record of the deed from the office of the Recorder of Deeds was produced in open court and exhibited to opposing counsel to verify our statement as to the date of the deed in controversy, and while that may not be practicable in this court, the fact is as we have stated it. In the case of Kaiser and Stickney, above referred to, it was held by this court that property vested in the wife, such as was the property in controversy, was held by her subject to her common-law disabilities.

The case of Cammack *vs.* Carpenter, 3 Appeals D. C., 219, is to the same effect, and the decision there was that a married woman had no power to dispose of her general property by deed, and if she had no power to convey, she had no power to devise.

We contend further that the bill of exceptions appearing in this record is not in such shape that this court can disturb the judgment of the trial court or of the Court of Appeals. It nowhere appears that the bill of exceptions contains all the evidence. The certificate of the trial justice does not so state and it does not appear from the context.

The bill of exceptions must be certified by the judge and must show on its face that it contains all the evidence touching the questions involved in the assignment of error, otherwise the judgment must be affirmed.

Rollins *vs.* Gunnison, 80 Fed. Rep., 692.

R. R. Co. *vs.* Washington, 49 Fed. Rep., 347.

Elliott's General Practice, Sec. 1068.

Taylor *vs.* Hage, 32 U. S. Ct. of Appeals, 548.

Finally, as to the question of consideration for the conveyance to Mrs. Elkin moving from her to her husband, as to the question of estoppel and the presumption of death, upon all of which the plaintiff in error contends that she was entitled to go to the jury and that on this account the trial justice erroneously directed a verdict in favor of the plaintiff, we submit that the rule as stated by this court is that "in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed.

Anderson *vs.* Beal, 113 U. S., 241, and as was stated in Herbert *vs.* Butler, 97 U. S., 319. "Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury but may direct them what verdict to render; and in the case of Pleasants *vs.* Fant, 22 Wall., 116, the court says "Where the record is such that the court would be compelled to set a verdict aside as not founded upon sufficient evidence the court is not justified in going through the idle ceremony of submitting to the jury the testimony on which the plaintiff relies when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff the verdict would be set aside.

Applying this rule to the case now before the court we submit with all confidence, and without further discussion that there is not a particle of legal evidence in this record to overcome the presumption of Elkin's death which the law implies from the undisputed evidence, there is not a particle of evidence that the plaintiff knowingly

ratified the unlawful and unauthorized sale made by Calvert, the executor of Mrs. Elkin's will, and there is no evidence whatever that at the time of the conveyance to Mrs. Elkin she gave anything of value to her husband as a consideration for the conveyance. It is therefore respectfully submitted that the judgment below should be affirmed.

H. G. MILANS,
M. J. COLBERT,
For Defendant in Error.

APPENDIX.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GRACE A. B. RATHBONE, *Appellant*,
v.
FRANCES REBECCA HAMILTON. } No. 320.

Filed November 9, 1894.

Appeal from judgment of special term of Supreme Court of District of Columbia, at law, No. 31,827, Bradley, J., in favor of defendant in action of ejectment. *Reversed and cause remanded.*

Messrs. HAMILTON & COLBERT and H. G. MILANS for appellant.

Messrs. A. A. LIPSCOMB and PHILIP WALKER for appellee.

Mr. CHIEF JUSTICE ALVEY delivered the opinion of the court:

This is an action of ejectment brought by the appellant as one of the heirs at law of Lucy V. Elkin, deceased, against the appellee to recover an undivided third part of an acre of land, situate in the District of Columbia. At the trial below a verdict was directed to be returned for the defendant, and the plaintiff has appealed.

Both parties claim to have derived title from a common source, that is, from Mrs. Lucy V. Elkin, deceased, the plaintiff as heir at law, claiming by descent, and the defendant as purchaser, claiming by virtue of a sale made under the will of Lucy V. Elkin. The facts of the case,

so far as the leading and important questions are concerned, are but few, and about which there is no dispute.

It appears from the record that, on the 29th day of April, 1872, Abram Elkin, Jr., the husband of Lucy V. Elkin, since deceased, was owner of the land in controversy, and on that day he (his wife joining with him), for the nominal consideration recited of five dollars, conveyed the property to Frederick G. Calvert, the brother of the wife, Lucy V. Elkin; and on the same day, and as part of one and the same transaction, the brother, Frederick G. Calvert, for the like nominal consideration of five dollars, recited in the deed, reconveyed the property to the said Lucy V. Elkin, and both deeds were at the same time filed for record, and were recorded together. They appear to have been executed and acknowledged before the same justice of the peace, and the deed from Calvert and wife to Mrs. Elkin is an exact transcript of the deed from Elkin to Calvert, *mutatis mutandis*. After they were recorded, both deeds were at the same time delivered to Abram Elkin, the husband, according to the memorandum made upon the record by the recording officer.

Being thus invested with the fee simple estate in the property, Mrs. Lucy V. Elkin, on the 22d day April, 1876, made what purports to be her last will and testament, executed in due form, and which was, after her death, admitted to probate. By this will she devised the real estate to be sold, and the proceeds of sale to be distributed, and she appointed her brother, Frederick G. Calvert, her executor. Shortly after the date of her will Mrs. Elkin died, and left her husband and three children surviving her. Her husband, soon after his wife's death, left the District of Columbia, and has not since been heard of by his family; and whether he is dead or alive

is a question about which there is no positive proof in the record, except the length of time since he was heard of, and the question was not submitted to the finding of the jury.

Acting under the will as executor, Calvert, sometime after obtaining letters testamentary upon the estate of his sister, sold and conveyed the real estate in controversy to the defendant, Frances Rebecca Hamilton, who took possession of the property and still holds the same, claiming ownership thereof by virtue of the sale and conveyance made to her under the will of Lucy V. Elkin, deceased.

At the trial, assuming all the material facts to be undisputed, the plaintiff prayed the court to instruct the jury to return a verdict for the plaintiff, and the defendant, on the other hand, prayed the court to instruct the jury that, upon the whole evidence, they should return a verdict for the defendant; and this latter instruction was granted, and the former refused. To these rulings the plaintiff excepted.

The first question is, from whom and how did Mrs. Lucy V. Elkin, under whom both parties to this action claim, really acquire the property, and what was the nature of the property as she held it. Did she acquire and hold it in her common law right as a feme covert, or did she acquire and hold it as her separate statutory estate, as if she were not married, under Section 727 of the Revised Statutes of the United States relating to the District of Columbia? This depends, of course, upon the terms of the statute, and the nature of the transaction as shown by the deeds.

The section of the statute just referred to is part of the revision of what is generally known as the Married Woman's Act, of the 10th of April, 1869, 16 Stat., 45. The section as it stands in the revision is as follows:

"Sec. 727. In the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than *by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband nor be liable for his debts."

Now, if the wife acquired the property in question by gift or conveyance from her husband, she did not hold the same as absolutely as if she were unmarried; but she held the same as her general property, as by the common law she was authorized to acquire and hold real estate, and not as her statutory separate estate. And assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was employed, it was no less in legal effect and contemplation, a gift or conveyance from the husband to the wife. Indeed, if the exception in the statute could be avoided by adopting such a facile method of conveyance to the wife as that here employed, such exception would simply be rendered nugatory, and would have better been omitted from the statute. The deed, however, to the wife was completely effective, and vested in her the legal title to the property, but she held such property

as her general estate, subject to her common law disabilities as a feme covert. This has been expressly held, in reference to this very statute, and in a case like the present, where the title to the wife was conveyed by the husband through the medium of a third party. Kaiser *v.* Stickney, Bk. 26, L. C. Ed. Sup. Ct. Rep., 76; S. C., 131 U. S., 87, of appendix of previously omitted cases. And so in the case of Cammack *v.* Carpenter, 1 App. Case, D. C., (Wash. Law Rep., Vol. 22, page 302.) These cases, just referred to, arose since the Married Woman's Act of 1869, and were decided in reference to the provisions of that act; and it was expressly held, that the property so acquired by the wife was held by her *as her general property*, which she could only convey by uniting with her husband in a deed executed in the form required by Secs. 450, 451 and 452 of the Revised Statutes relating to the District of Columbia. See, also, the case of Williams *v.* Reid, 19 D. C., 46. It is clear, therefore, that Lucy V. Elkin did not acquire and hold the property in controversy under the statute as if she were unmarried.

2. It is contended, however, that even though it be conceded that the wife took the property as her general estate, according to the common law, yet the statute clothed her with full power of disposal of the property, either by deed or will. And it is upon the terms of the next succeeding section, 728, of the Revised Statutes of the District, that such contention is founded. That section is in these terms:

"Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

Both this and the preceding section, 727, have marginal references to the original Act of 1869, Ch. 23, Sec. 1 (16 Stat., 45), as the source from which the text of the

two sections, 727 and 728, was made. There is nothing to indicate, apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the Act of 1869, Ch. 23, Sec. 1. At most this change of phraseology could but give rise to a doubt as to the meaning of the statute.

Before this Act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the Statute of Wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a feme covert at the common law was and is subject to the marital rights of the husband, and if he survives her, after the birth of a child, he is entitled to a life estate in the land by the courtesy.

Has this common law principle, then, been so far radically changed by this act of Congress that the wife, though acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the Act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision.

As a rule of construction, it is laid down by the Supreme Court of the United States, that where the meaning of the Revised Statutes is plain, the court will not re-

cur to the original statutes to see if errors were committed in the revision, but may do so to construe doubtful language employed. Cambria Iron Co. *v.* Ashborn, 118 U. S., 54; United States *v.* Lacher, 134 U. S., 624.

In the last case just referred to, that of U. S. *v.* Lacher, the chief justice, in delivering the opinion of the court, said:

"If there be any ambiguity in Section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the Statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law. Citing United States *v.* Bowen, 100 U. S., 508, 513; United States *v.* Hirsh, 100 U. S., 33; Myer *v.* Car Co., 102 U. S., 111. And it is said that this is especially so where the act authorizing the revision directs marginal references, as is the case here. 19 Stat., Ch. 82, Sec. 2, p. 268; Endlick on Int. Statutes, Sec. 51. Accordingly we find that this section took the place of Section 279, of the Act of June 8th, 1872."

By the first section of the original Act of 1869, Ch. 23, it was enacted that—

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a feme sole, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

In the revision this section of the original act has been

broken or divided into two short sections, 727 and 728. And the change of phraseology that has occurred does not seem to be more than was necessary and appropriate in making the new arrangement of the subjects-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to the *same property* that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from her husband. The wife's power of disposal over property contemplated by the statute, is given either by deed or will; but as we have seen, it has been held expressly, in cases like the present, that the power of disposition by deed does not exist. Kaiser *v.* Stickney, supra; Cammack *v.* Carpenter, supra. And if the power could not be exercised by deed, for the same reason it could not be exercised by will.

3. But it has been contended for the appellee that, independently of the power given by the statute, the wife may dispose of her real estate that she holds to her sole and separate use, either by deed or will; and that the property in this case was held by the wife to her sole and separate use.

It is doubtless true that a married woman can, in equity, dispose by deed or will of the equitable fee simple of her real estate, and of the absolute interest in her personal estate which belong to her for her sole and separate use; since in respect to such property she is a feme sole. And, in respect to such property, it is immaterial that the legal estate is not vested in trustees, as the husband and all other persons on whom the legal estate may devolve, will be deemed and treated as trustees for the persons to

whom the wife has given the equitable interest. This is the established doctrine in the English Chancery, and it is the established doctrine of the courts of this country, to the same extent. Tylor *v.* Meads, 4 D. I. & S., 597; Pride *v.* Bubb, L. R. 7 Ch., 64; Cooper *v.* MacDonald, 7 Chan. D., 288; 2 Sto. Eq. Juris., Sec. 1380. If the gift or conveyance be designed to be for the wife's separate and exclusive use, that intention will be fully acted upon and carried into effect. But the question is, whether the instrument of conveyance shows plainly that to have been the intention of the parties to it; for, as said by Judge Story, "the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights in the property." Indeed, in all cases, the words must manifest an unequivocal intent to exclude the power and marital rights of the husband. 2 Sto. Eq. Juris., Secs. 1381, 1382. But here, unfortunately for the defendant, there is nothing in the deed from Calvert to Mrs. Elkin to create a sole and separate estate in her, to the exclusion of the marital rights of the husband. The only clause in the deed which could possibly be supposed to have any such effect, is the ordinary habendum clause, which declares that the property was to be held "unto the said party of the second part, *her heirs and assigns*, to and for *her and their sole use, benefit and behoof forever.*" This is but a common formula found transcribed in all the several deeds in the record; the deed from Quinter to Abram Elkin, Jr., for the property in question, appearing to furnish the precedent for all the subsequent deeds for the same property. It clearly has no such effect as that of declaring a sole and separate estate in the wife. In the case already referred to, of Kaiser *v.* Stickney, supra, the deed to the wife contained the same formal habendum clause as that of the present deed, but it was not contended, nor even suggested, that

it was sufficient to create a separate and exclusive estate in the wife.

If, however, the deed contained an effective clause, creating a sole and separate estate, it could not avail the defendant in this action; for in an action of ejectment a legal estate or title is as necessary when title is relied on as a defense, as is such an estate or title to the right of the plaintiff to recover. A mere equitable estate could not be set up to defeat the legal estate.

4. It has been contended by the plaintiff here, the present appellant, that even assuming that Mrs. Elkin had power to dispose of the property by will, the executor named in the will had no power of sale, and that the sale made by him, therefore, was simply void. But in this we do not agree. If the right to make the devise of the estate existed, the testatrix directed her property, real and personal, to be sold, and after deducting funeral and other expenses, she directed how the proceeds of the sale should be distributed and paid out. The making of this distribution was a proper duty of the executor; and it is clear, we think, that the executor named in the will would have power to sell and convey the real estate, as he would have of the personal estate, raised by necessary implication. This would seem to be the settled construction of similar devises or directions to sell, without express power conferred. Magruder *v.* Peter, 11 Gill and John., 217; Peter *v.* Beverly, 10 Pet., 532; Taylor *v.* Benham, 5 How., 233.

Inasmuch as this case must be sent back to the court below for retrial, it is proper to advert to a question that must arise in the course of the trial, and that is, the question as to the right of entry of the plaintiff. That right depends upon the question, whether the husband of Mrs. Lucy V. Elkin is dead or alive. If alive, upon the assumption that Mrs. Elkin was without power to devise

the property, he would be entitled to his life estate by the courtesy, and until the termination of that estate, the plaintiff would have no right of entry in her character of heir at law of her mother and, consequently, no right to maintain an action of ejectment. To maintain the action the death of the father must be shown either by positive proof or presumption.

The judgment appealed from must be reversed and a new trial awarded.

Judgment reversed, with costs to the appellant, and a new trial awarded.

See. 22 Wash. Law Rep. 766.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

SPECIAL TERM.

GRACE A. B. RATHBONE *vs.* FRANCES REBECCA HAMILTON. } AT LAW No. 31,827. EJECTMENT, ETC.

Opinion of the Court below—Judge McComas.

(After full argument.) "I have listened to the exhaustive discussion of the law based on the evidence of the witnesses, and, the decision of the Court of Appeals maps the course of this case and the limits within which this court had discretion upon the paper case of the plaintiff then, and more decidely as I apprehend now than then. The plaintiff must recover upon the strength of his own title. He has offered a patent and the subsequent conveyances, which the court has admitted as sufficient to prove the chain of title and make out the plaintiff's case

unless some one or other of the defences here urged, shall intervene.

In this trial the question recurs: was this property in controversy, the separate estate of Lucy V. Elkin, or was it an estate in fee which accrued to her by gift or conveyance from her husband? Upon the form of the conveyances and by force of their terms, the Court of Appeals concluded that the conveyance from Abraham Elkin, by means of a trustee, to his wife, Lucy V. Elkin, was a voluntary conveyance; and at that time no effort was made to show any real pecuniary consideration, which, it was competent, under the terms of that conveyance, for the defendant to show. That attempt is now made with great ingenuity and persistence.

After having had my mind refreshed as to every particle of evidence by the learned counsel on the one side or the other, on this motion on behalf of the plaintiff, to instruct the jury to return a verdict for the plaintiff, and the motion accompanying, of the defendant asking a like instruction for the defendant, looking at the plaintiff's case as proved, and then considering what there is of proof for the defendant, I find a failure to show in any of the modes sought to establish an interest in the payment of the purchase money, either out of gifts to her of money from her father-in-law, or other sources, or out of the accumulation of her own earnings, or by any testimony sufficiently definite, that money or any part of the consideration of the original purchase in 1867, was ever given by Lucy V. Elkin, to her husband upon such an express stipulation, agreement or understanding, as would constitute it a separate fund or estate in the hands of her husband. Nor is there any evidence of understanding or agreement, to support a conveyance of property in pursuance of any money transactions between husband and wife.

The evidence is vague, unsubstantial, inconclusive, not such evidence as that, if a jury should thereupon conclude that there was a valuable consideration to support the claim of the wife to a separate estate under that conveyance, the court could possibly let such a verdict stand.

I am, therefore,—of course it is a case of great hardship upon the defendant in this case—constrained to the conclusion that, with respect to the attempt to show a separate estate in the wife, the case is left now where it was when considered by this clear, and forcible *decision of Chief-Justice Alvey*, in reviewing the former trial.

If that be so, of course the will and proceedings thereunder passed no title.

Was there in this case such an estoppel as bars this plaintiff upon this paper title from maintaining this action? This defendant and this plaintiff had no relation in respect of this property. This plaintiff did nothing and said nothing to prejudice, to mislead, or to injure this defendant in respect of the sale of 1879, and in respect of the whole transaction of the payment of the purchase money up to the time of the conveyance of the property.

The tenant by the courtesy was the person to assert the right to possession until after the sale, conveyance, payment of purchase money, and improvements were all made. If there was prejudice to an estate and an injury to possession, it was as of his estate, and not as of the estate of the reversioner. During that period when these transactions occured, the plaintiff was under disability as an infant. If that be so, there is not such an estoppel as has been urged upon me, not as applying to this case, but urged to establish the proposition that an estoppel in *pais* is an adequate defense in an action of ejectment.

But what was more strongly relied upon, was a ratifi-

cation of the wrongful sale by Calvert, and a definite, clear election on the part of this plaintiff after reaching her majority, to take the proceeds instead of the property.

I have considered the proofs on both sides, to ascertain whether there was such ratification and sale and such an election by the plaintiff, with full knowledge of all the material facts of the whole transaction. The information upon the whole does not appear to have been definite, clear, and full, even considering the information gathered from the testimony of Mrs. Hamilton, of Mrs. Rathbone, and of Calvert, (who appears to have the facility of not knowing much about his own transactions about this estate).

In reviewing the finding of a jury upon the testimony as to the ratification by this plaintiff, or an election to accept the proceeds and abandon the property, coupling all the testimony, this court would be constrained at a later stage to set aside a verdict upon such testimony.

Admitting, now, the whole of the evidence, which, by counsel on both sides was admitted, subject to exception—assuming it all to be in and admissible—yet it is too attenuated as a demand on Calvert, with knowledge of the material facts, and with such information as should accompany a ratification of, or an election to follow the proceeds instead of the property. At best this plaintiff says in the printed report of the last trial that she was probably of age. That she "was probably of age" is not sufficient evidence upon which to allow a verdict to stand. Calvert says he thinks she was of age at the time of this much discussed transaction.

It seems to the court that, in respect of knowledge on the part of the plaintiff in respect of the clearness of proof that in fact there was anything done after she reached her majority to bind her as of a ratification of the transaction,

or that she with full knowledge of all the material facts intended to ratify, the single circumstance with respect to the shoes fails. Nor do the other little circumstances of evidence here and there eke out the case on behalf of the defendant.

Despite such a lack on behalf of the defendant, if there be a failure of ratification by this defendant, or a failure of election, and not sufficient evidence upon any ground to sustain it, there remains the other ground, viz: whether or not the life tenant (who, under the decision of the Court of Appeals, would be the person entitled to enjoy his estate before this reversioner in her own right) could maintain an action of ejectment. It is pertinent to remember that in courts of justice the presumption of survivorship or of death finds its beginning in the effort in 19 Charles II, Chap. 6, to establish by law a rule of presumptive evidence by which an Act of Parliament sought to redress these very inconveniences of want of proof of the decease of persons upon whose lives estates depend. By that statute the term of seven years was fixed as a definite space in respect of a tenant for life, whereby, at the end of such term, the person absent, not accounted for, not heard of, during a series of years should be presumed to be dead, in the interest of the possession and enjoyment of estate by the reversioners. The rules in respect of this legal presumption of death seem to be well stated in Lawson on Presumptive Evidence. It is for the court to apply these rules to the evidence in this case. When an absentee is shown not to have been heard from for seven years by the *person* who, if he had been alive, would naturally have heard from him, the absentee is presumed to have been alive until the expiry of seven years, and to have died at the end of that term. That brings up the consideration of the nature of such absence

in respect of which it is the rule that where the removal is temporary, absence alone, without being heard from, is sufficient to raise the presumption of death after seven years. If a man leaves his home, and goes off for a few hours' absence only but never returns, the mere fact of such temporary absence is itself sufficient to warrant the presumption of death. But in a case where the absence is permanent, without intention to return the presumption does not arise until inquiry has been made at the fixed residence, home or domicil of the person so absent and unaccounted for; and this inquiry must be made not only at the fixed residence, home or domicil, but from persons who would naturally have heard from him, whether they be relatives or strangers. Who, then, are such persons, and where is this home, residence or domicil of such absentee? By this same authority it appears what must necessarily be the rule of inquiry that the place from which he first departed is such residence, home, or domicil, and does not include places where the absentee may have afterwards resided or visited, especially as a temporary flitting or tramping manifestation of existence here or there.

In the state of the case now appearing, the District of Columbia is the place where this Abram Elkin had an estate by the courtesy; and where, it may appear that he still had money at interest. Here he was well-known. The very forum and jurisdiction in which this suit is now being litigated, is that whence he departed in 1876, the action having been brought June 13, 1891. If the inquiry is not to be made among the people here, where he had relatives, acquaintances and friends, it is pursued arbitrarily in other places; and it is in evidence that in some fashion or other some inquiry was made in Chicago, and in Philadelphia, where his mother formerly resided.

Her whereabouts in this case appear vague; there is some shadowy evidence indicating that she herself may have gone beyond seas with this absentee himself, more than seven years before the bringing of this suit. The father, it appears, was estranged from his son, and, although by relationship he would have been the person naturally to have heard from the son, he does not appear in this case to have been such person. Then there were three children, one of them a cripple. No matter how worthless, shiftless, or heartless a man may be, if he has three or four children, there is no place in this universe where his interests or inquiries or affections would be so likely to call him as their domicil; and here is where those children still remain, one of them known to this absconding parent to have been a cripple. His relatives and friends; Calvert, the executor of this will, the brother-in-law of this person, the last person addressed by him and familiar with and friendly to him—all resided here; and all of the available avenues of information have been explored and the results have been brought before the jury in this case.

The presumption of death is simply a *prima facie* presumption. But there has not been, so far as this court can find, any evidence to countervail that presumption of the law, the presumption defined in terms of the Statute in respect of just such estates and such controversies as the pending law suit—a presumption which can be rebutted in the forum whence he departed and where his right is now being litigated with better opportunities than in a distant land, as in Australia, or some other countries far away, where the absentee is traced by meager evidence.

So that, allowing the presumption to be but *prima facie*, the court cannot find any evidence in this case which

tends to countervail the legal presumption, and the court is therefore constrained to hold that the rule applies to this case, and that Abram Elkin is presumed to have died on the last day of the seven years after his departure from this community. That departure was in 1876 and the action was instituted June 13, 1891.

The case is one of very great hardship against this defendanant, it is true, but this court is not here to adjust equities with the natural impulses of man. The court must apply the law. As there is no doubt upon which the court, seeking to find some remedy, could support a verdict for this defendant, the court is constrained to grant the instruction on behalf of the plaintiff, and will instruct the jury presently to return a verdict for the plaintiff. Of course counsel will take an exception.

Mr. Worthington: We take an exception.

The Court: The clerk will take the verdict for the plaintiff for an undivided one-third part of said piece or parcel of ground as claimed in the declaration.

No. 6.

Sup. Ct. Bf. of Hamilton & Colbert

SUPPLEMENTAL BRIEF OF DEFENDANT.

Supreme Court of the United States.

OCTOBER TERM, 1899.

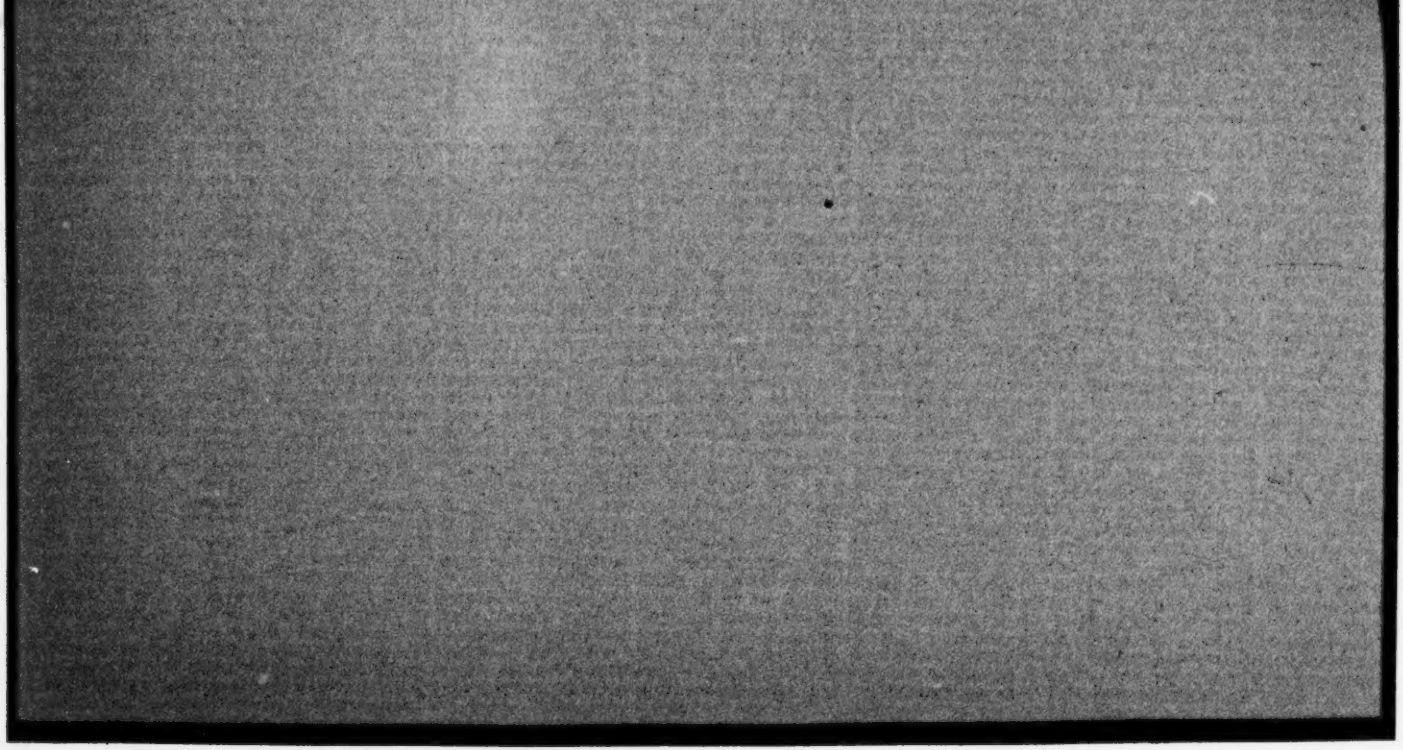
No. 6.

FRANCES REBECCA HAMILTON,
Plaintiff in Error,
vs.
GRACE ABBIE B. RATHBONE.

In Error to the Court of Appeals of the District of Columbia.

A. J.
G. E. HAMILTON & COLBERT,
H. G. MILANS,
Attorneys for Defendant.

MILANS, LAW PRINTER, 420 7 STREET, N. W., WASHINGTON, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1899.

FRANCES REBECCA HAMILTON,
Plaintiff in Error,
vs.
GRACE A. B. RATHBONE.
No. 6.

SUPPLEMENTAL BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

This case has been restored to the docket for reargument before a full Bench, and the attention of counsel has been directed by the Court to the consideration of the question of the effect of Sections 727 and 728 of the Revised Statutes of the United States relating to the District of Columbia upon the original act of Congress known as the Married Womens' Act, approved April 10, 1869, and found in 16th Statutes at Large, page 45.

The text of the latter act is as follows:

"SECTION 1. In the District of Columbia the right of any married woman to any property personal or real belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a femme sole, and shall not be subject to the disposal of her husband nor be liable for his debts; but such married woman may convey, devise and bequeath the

same, or any interest therein, in the same manner, and with like effect, as if she were unmarried."

"SEC. 2. And be it further enacted that any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried; but neither her husband, nor his property shall be bound by any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

The provisions of the Revised Statutes of the United States, relating to the District of Columbia, taken from the original act above quoted, are as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

"SEC. 728. Any married woman may convey, devise or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

"SEC. 729. Any married woman may contract and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried."

"SEC. 730. Neither the husband nor his property shall be bound by any such contract made by a married woman nor liable for any recovery against her in any

such suit, but a judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It will thus be seen that Section 1 of the original Act of 1869 is divided into two sections in the revision, embracing Sections 727 and 728 of the Revised Statutes. Section 727 of the revision is almost identical with Section 1 of the original act, the only change being that the word "unmarried" is substituted in the revision for the words "femme sole" in the original act. In the original act the power of disposition conferred upon the married woman enabled her to convey, devise, or bequeath "the same," meaning the property referred to in the first portion of Section 1 of the original act—that is to say, property acquired in any other way than by gift or conveyance from her husband. When the revision came to deal with this power of disposition, and sought to incorporate it into an independent section, it was, of course, impossible to use the words "the same," and in their place and stead were substituted the words "her property." Section 729 of the revision is identical with the first portion of Section 2 of the original act. Section 730 variess lightly in phraseology from the last portion of Section 2 of the original act, but there is no change in the substance of the provision. It is contended on the part of the plaintiff in error that the broad language of Section 728 confers upon the married woman the right to convey, devise, and bequeath all classes of property owned by her, whether common law property, her statutory separate estate, or her equitable separate estate. But we respectfully submit that there can be no valid foundation for such a contention, if these four sections of the Revised Statutes to which we have referred are to be read and construed together, in the light of the original

act from which they were taken. Section 727 defines the nature of the property which the married woman may hold as her separate estate; it provides in terms that only such property as she acquires otherwise than by gift or conveyance from her husband shall be her separate estate, and only in such property is her title to be as absolute as if she were unmarried. In all other classes of property and certainly in that class of property which she held as at common law her title was not an absolute one; her husband. in the latter class of property, had his marital rights. He might collect the rents and profits therefrom during the marriage, and after the wife's death he took an estate by the courtesy, provided there was born of the marriage a child capable of inheriting. The wife could not by any act of hers defeat these rights of the husband; she could make no disposition of the property by her own single act, nor could she dispose of the property by her will; she had absolutely no power of disposition by will, and yet, if the construction sought to be placed Section 728 of the Revised Statutes is correct, there is no sense or meaning in the provisions of Section 727 limiting the separate estate of the married woman to such property as she acquired otherwise than by gift or conveyance from her husband. In the same manner, if we turn to the provisions of Section 729 of the revision, we find that the wife's power of contract, and her right to sue and be sued, is limited expressly to her sole and separate property, that is to say, it is limited to property acquired otherwise than by gift or conveyance from her husband, and yet if Section 728 is to be given the effect contended for by the plaintiff in error we would have the anomaly of a married woman being given the power to convey her common law property coupled with an express

inhibition upon her to make any contract to convey the same, or to bind herself by any such contract, or to be sued in respect of it. The whole purpose and scheme of the Married Women's Act, and of the *revision* of the Married Women's Act, was to emancipate the married woman with respect to such property as she owned at the time of the marriage, or which she acquired during the marriage. in some other way than by gift from her husband. The whole object and purpose of the act were gratified when that class of a married woman's property was freed from the control and dominion of her husband, and the act expressly reserves the marital rights of the husband in such property as was vested in the wife by his voluntary gift. To adopt the construction of Section 728 contended for by the plaintiff in error, would be to destroy the husband's vested marital rights in his wife's common law property. If she could convey the same in her lifetime she could defeat his right to the rents and profits; if she could dispose of the same by will, she could defeat his estate by courtesy after death. Indeed this construction would be a radical departure from the scope of the Married Women's Act, and from the intention of Congress in passing it.

As was said by Chief Justice Alvey when this case first came before the Court of Appeals of the District of Columbia for review, "there is nothing to indicate apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the Act of 1869. Ch. 23, Sec. 1. At most this change of phraseology could but give rise to a doubt as to the meaning of the statute. Before this Act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her

real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the Statute of Wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a *feme covert* at the common law was, and is, subject to the marital rights of the husband, and if he survives her after the birth of a child, he is entitled to a life estate in her land by the curtesy."

"Has this common law principle then been so far radically changed by this Act of Congress that the wife, although acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the Act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision. * * * In the revision this section (Sec. 1, of the Act of 1869) of the original act has been broken or divided into two short sections, Sections 727 and 728. And the change of phraseology that has occurred does not seem to be more than is necessary and appropriate in making the new arrangement of the subject-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to *the same property*, that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from the husband."

To hold that Section 728 of the revision so far changed the rule of the common law, and so radically changed the provisions of the Act of 1869, as to give the wife the power of disposition with respect to property that she could not dispose of at the common law, or under the Act of 1869, would be to hold that Congress intended to give the wife the power of disposition by deed or will, but gave the wife no means of using the property, no control over it, and no power of contracting with respect to it. It would be to hold that Section 727 gave the husband certain vested rights in his wife's common law property which the wife might instantly deprive him of by the power of disposition conferred upon her by Section 728. Conceding all that can be claimed for the construction contended for by the plaintiff in error, the several provisions contained in the Revised Statutes are certainly inconsistant with each other, and create an ambiguity which justifies recourse to the original act, and when we turn to that act we can readily see how it was that a change of phraseology was made necessary by splitting original Section 1 into two sections of the Revised Statutes.

This court had precisely the same question before it in the case of Kaiser *vs.* Stickney referred to upon page 34 of our original brief, filed herein. In that case Mr. Chief Justice Waite said "It is very clear that the property in question was not under the provisions of Section 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser. She could not, therefore, *convey* it, or contract with reference to it in the same manner and with the same effect as if she were unmarried (Sections 728 and 729), but it was her general property which she could convey by uniting with her husband in a deed, executed in the form required by Sections 450, 451 and 452 of the same Statutes."

In this case of Kaiser *vs.* Stickney, there is no statement of facts, and yet the court undoubtedly had in mind the provisions of Section 728 of the Revised Statutes in disposing of the question, for Section 728 is specifically referred to, and the court specifically holds that the language contained in that section is not sufficient to give to the wife the power of disposing of her general property by deed. It is true that the deeds in the Kaiser–Stickney case were executed before the revision, but the court does not place its decision upon the ground that the Revised Statutes did not affect the case because the deeds were executed before the revision. On the other hand, the court distinctly states that Section 728 does not give a married woman the right to dispose of her general property by deed.

II. We most respectfully submit to the court whether in the consideration of this question it is not material and pertinent to take notice that Abram Elkin held the land in dispute in fee, from 1867, (Rec. p. 17) and on April 29th, 1872, he conveyed it to Fred G. Calvert, and on the same day Calvert conveyed it to Lucy V. Elkin, wife of Abram Elkin. (Rec. p. 12, 13.)

Over two years after that, to wit, on June 22, 1874, the Revised Statutes were enacted into Statute Law (Revised Statutes, Vol., 1, p. 1085, Section 5596.)

Now it would seem clear that as Mrs. Elkin took the property under Act of 1869, took it as her general property, and so held it subject to all her common law disabilities, and subject to all her husbands' vested martial and curtesy rights, whatever the terms or the construction of the Revised Statute her disability to make a valid devise of it remains unaffected.

HAMILTON & COLBERT,
HENRY G. MILANS,
Attorney for Defendant.